United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

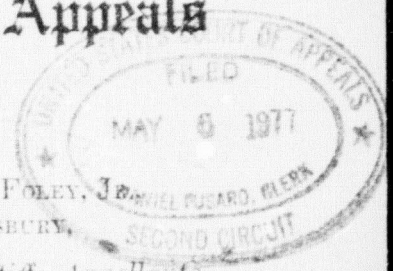
ORIGINAL

76-7600

To be argued by
JOHN J. LOFLIN

United States Court of Appeals

For the Second Circuit



J. P. FOLEY & COMPANY, INC., JOHN P. FOLEY, JR., ANNE A. FOLEY, and ANITA SALISBURY,

Plaintiffs-Appellants,

against

NEW YORK STOCK EXCHANGE and AMERICAN STOCK EXCHANGE,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR DEFENDANT-APPELLEE AMERICAN STOCK EXCHANGE, INC.

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BRIEF FOR DEFENDANT-APPELLEE AMERICAN STOCK EXCHANGE, INC.

Preliminary Statement

This brief is submitted on behalf of defendant-appellee American Stock Exchange, Inc. (the "AMEX").

Plaintiffs in this action are John P. Foley, Jr.; Anne A. Foley, his wife; Anita Salisbury; and J. P. Foley & Co., Inc., the corporation of which Mr. Foley was President;

Mrs. Foley, Secretary; and Ms. Salisbury, Vice-President. On April 3, 1970, plaintiffs made an investment in Blair & Co., Inc. ("Blair") which involved the subordinated loan to Blair of certain securities owned by plaintiffs having an alleged value of $3 to $4 million. Blair was a member organization of defendants New York Stock Exchange, Inc. (the "NYSE") and AMEX. In late 1970, Blair went into liquidation resulting in the loss of plaintiffs' investment. Plaintiffs' action seeks recovery for their loss which they claim they would not have incurred had defendants regulated Blair differently.

Plaintiffs appeal from a final Judgment entered on December 17, 1976 after a jury trial before the Honorable Marris E. Lasker, United States District Judge, which (i) awarded judgment to defendant AMEX dismissing all claims against it based upon a directed verdict ordered by the court at the close of the plaintiffs' case, (ii) awarded judgment to defendant New York Stock Exchange, Inc. based upon a directed verdict ordered by the court at the close of the plaintiffs' case on all claims asserted against defendant NYSE except those arising under Section 6 of the Securities Exchange Act of 1934 (15 U.S.C. §78f) (the "Exchange Act"), and based upon a jury verdict rendered in favor of defendant NYSE upon plaintiffs' claims under Section 6 of the Exchange Act. (The final Judgment appealed from is contained at A 23-24,* the rulings by the

* References to "A——" refer to the page citation in the Joint Appendix on file in this appeal. References to "E——" refer to the page citation in the Exhibit Volume of the Joint Appendix on file in this appeal and to the page citation in the Supplement to Exhibit Volume of the Joint Appendix appended to this brief. The Supplement to Exhibit Volume was necessitated by plaintiffs' failure to include in the Joint Appendix all portions of the Record in this appeal designated by the parties pursuant to Rule 30(b), Federal Rules of Appellate Procedure.

court below upon defendants' motions for directed verdicts are contained at A 1002-1012.)

Although the trial court found additional reasons for dismissal of the claims against defendant AMEX (A 1003-1006), plaintiffs have chosen to appeal only from the dismissal of their claims under Sections 10(b) and 20(a) of the Exchange Act (15 U.S.C. §§78j(b) and 78t(a)) which, in part, are governed by legal principles equally applicable to both defendants. In the interest of brevity and to avoid unnecessary repetition, defendant AMEX refers to and incorporates herein by reference the Statement of the Case, Statement of Facts, and Argument set forth in the Brief for Defendant-Appellee New York Stock Exchange, Inc., submitted herein. This brief will supplement the brief of defendant NYSE to the extent necessary to demonstrate the additional particular reasons why the judgment below should be affirmed as to defendant AMEX.

Counterstatement of Issues Presented

Plaintiffs have failed to delineate with any precision the issues raised with respect to defendant AMEX on this appeal.

In their statement of Issues Presented (PB 1-2)* plaintiffs raise but three issues for consideration on this appeal, two of which, concerning the propriety of the trial court's (i) charge to the jury, and (ii) ruling upon plaintiffs' motion for Judgment N.O.V. with respect to plaintiffs' claims under Section 6 against defendant NYSE, can not be di-

* References to "PB——" refer to the page citation in the Brief for Plaintiffs-Appellants on file in this appeal.

rected to defendant AMEX since the trial court dismissed all claims against defendant AMEX at the close of plaintiffs' case. Plaintiffs have expressly abandoned their Section 6 claims for purposes of this appeal.* (PB 31.)

The issues are therefore limited to the propriety of the trial court's dismissal by directed verdict of plaintiffs' purported** claims against defendants under Sections 10(b) and 20(a) of the Exchange Act.

Statement of Facts

Defendant AMEX respectfully refers the Court to the brief of defendant NYSE for a full exposition of the material facts relevant to decision of this appeal. With respect to defendant AMEX, the absence of any factual basis upon which any claims advanced by plaintiffs against defendant AMEX might be sustained is apparent. Examination of the record in this action discloses a total failure of proof by plaintiffs of any cause of action against defendant AMEX.

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* Plaintiffs claim to preserve the two issues referred to above respecting their claims against defendant NYSE under Section 6 of the Exchange Act for purposes of appeal to the Supreme Court (PB 2).

** In their Amended Complaint, plaintiffs' claims under Section 10(b) are directed solely against defendant NYSE and no such claim is advanced against defendant AMEX (A 13-17). Similarly, plaintiffs never pleaded a cause of action against defendant AMEX under Section 20(a) (A 8-22). The trial court dismissed plaintiffs' purported claims against defendant NYSE under Section 20(a) and for rescission at the close of the plaintiffs' case for reasons including plaintiffs' failure to plead a cause of action thereunder (A 1010; *see*, Supplemental Trial Memorandum of Defendant New York Stock Exchange, Inc., which is not contained in the Joint Appendix filed in this appeal).

Plaintiffs' claims rest ultimately upon the alleged failure by defendant exchanges to regulate and supervise the financial condition of Blair, the brokerage firm in which plaintiffs made their investment. Yet the pertinent rules of the AMEX in force during the relevant period provided that the supervision of the financial condition of AMEX member firms which were also members of defendant NYSE, such as Blair,* was the responsibility of defendant NYSE, not defendant AMEX. (American Stock Exchange, Constitution and Rules, March 1, 1970, Rules 440-445, E465-468, Supplement to Exhibit Volume of the Joint Appendix appended to this Brief.)** Defendant AMEX, in compliance with those rules, did not participate in the supervision of the financial condition of Blair nor in any of the other events by reason of which plaintiffs seek to impose liability on defendants.

Plaintiffs presented no evidence that defendant AMEX took any role in the regulation of the financial affairs of Schwabacher & Company, a West Coast brokerage firm which merged with Blair in 1969, or of Blair, or that defendant AMEX participated in that merger, participated in or reviewed the results of the annual surprise audit of Blair or other reports by Blair concerning its financial condition, or that defendant AMEX was consulted concerning or otherwise involved in the attempts by the Securities and Exchange Commission ("S.E.C.") and the NYSE to regulate and stabilize the financial affairs of Blair in the period 1969 to 1970. Specifically, the AMEX issued no instructions or directives regarding Blair's financial condition during

* Such firms are often referred to as dual members.

** Present AMEX Rules are substantially similar. 2 CCH, AMERICAN STOCK EXCHANGE GUIDE, ¶¶9450-9457.

this period (A 421). Plaintiffs called no witnesses to testify as to any role played by defendant AMEX in those proceedings and failed to summon any personnel of defendant AMEX, including a senior AMEX officer whose deposition they had taken (Tr. 1512)* to establish any involvement by defendant AMEX in those matters. The reason is clear. AMEX did not participate.

Moreover, plaintiffs failed to adduce evidence that at any time relevant to the complaint defendant AMEX had knowledge of the state of Blair's financial condition. There was a complete dearth of evidence concerning involvement by the AMEX in the attempts by others to normalize the financial situation at Blair. The AMEX Rules provided that such regulatory responsibility rested with the NYSE. AMEX conducted itself at all times in conformance with those rules.

The only evidence presented concerning the AMEX was the deposition testimony of Mr. Oliver De Gray Vanderbilt, former Chairman of Blair (A 304), and the testimony of James B. Ramsey, former President and chief executive officer of Blair (Tr. 666-667, A 521), which established that the only contacts between those Blair personnel and the AMEX during the relevant period consisted of (i) a single informal luncheon meeting among various AMEX officers and representatives of Blair on February 10, 1970, and (ii) occasional chance encounters between Mr. Ramsey and Mr. Ralph Saul, then President of the AMEX (A 380), on the commuter trains between their New Jersey residences and New York City. Messrs. Vanderbilt and Ramsey, the senior officials of Blair, testified that these were the only

* References to "Tr. ——" refer to the page citation in the Trial Transcript on file in this appeal but not reprinted in the Joint Appendix.

contacts they had with the AMEX during this period. Mr. Vanderbilt had testified on deposition:

> "Q. Other than this luncheon meeting which you previously described, did you personally have any contact with AMEX officials, say from the period beginning in December 1969 through the spring of 1970. A. Not that I recollect." (A 420-21)

Mr. Ramsey testified:

> Q. The question as his Honor put it is: Do you remember whether, between January 15th and February 5th, you spoke to anyone at AMEX regarding Blair's condition. A. I do not recall. (A 467.)
>
> Q. Did you have any further meetings with any employees, officers or representatives of AMEX after February 10th? A. Formally?
>
> Q. Formally, informally—in any manner, shape or form. A. Then let me make a statement. On commuting trains, many of the people who worked on the Stock Exchange rode the commuter trains. I spoke to them off and on.
>
> The Court: Is that the only contact you recall?
> The Witness: Yes. (A 473, see also A 477-79.)

All of the testimony concerning contacts between Blair and the AMEX is contained in only 24 pages of the Trial Transcript. Mr. Vanderbilt's deposition testimony concerning the luncheon meeting appears at A 380, 382, 385-87 and 419-23. Mr. Ramsey's testimony concerning the same matter is contained at A 466-73, 477 and 591-92. Finally, Mr. Ramsey's testimony concerning the chance encounters on commuting trains is found at A 473, 478-79 and 592-93. Review of their testimony demonstrates that plaintiffs failed to prove any knowledge of or participation by de-

fendant AMEX in the events allegedly giving rise to their investment and subsequent loss.

Concerning the luncheon meeting, it is clear that this gathering was not similar to the meetings Mr. Ramsey had prompted on January 15 and 16, 1970 to inform the investors in Blair and then the NYSE and the S.E.C. of Blair's capital problems (A 398-401, 446-447, 473-475, 552-556, 582-583). Rather, the luncheon meeting was merely one of a series of meetings held by AMEX President Saul with various brokerage firms during this period in which the facilities of the Exchange available to assist its members were generally discussed (see, E 178). The testimony of Mr. Vanderbilt clarifies the general informational character of that luncheon as opposed to the specific regulatory purpose of meetings between Blair officials and the S.E.C. and NYSE during this period. Mr. Vanderbilt had testified briefly concerning the luncheon gathering in a deposition taken of him in another action in which the AMEX was not a party and at which the AMEX was not represented (A 380). When Mr. Vanderbilt was questioned at his deposition in this action, his testimony evidences the true character of the luncheon meeting:

> "Q. Now, you testified that you recall a luncheon that the American Stock Exchange had for Blair and people working for Blair in which they said that they recognized your problems. The problems that you referred to, were they the problems that gave rise as a result of the conversion to the Midwest System? A. I would say as far as the American Stock Exchange and all outside are concerned, the problems were the result of the sudden rapidly shrinking volume on the Exchange's trading volume, which heard so many firms,

forgetting any conversion, who had necessarily been geared up with large organizations to take care of a much heavier volume, and immediately after the volume decreased they were all being thrown into the red in a substantial way, and this, I think, was specifically the concern of the major exchanges.

"Q. I understand that. But did you apprise the American Stock Exchange of the other problems that you were experiencing, including the capital problems? A. I don't recall.

"Q. You don't recall the discussion with them at that meeting? A. No. The purpose of their meeting was not to tell us what we should or shouldn't do. They just merely set it up to acquaint us with the services and facilities that they had available to help, when necessary, member firms, and they were saying, which was very pleasant to hear, 'We are here to serve our members, and if you need any help from us, just let us know and we will do all we can.'" (A 385-86.)

"Q. At this luncheon meeting were you or Blair & Company directed to do anything concerning it? A. No. That wasn't the purpose of the meeting. As I previously testified, it was to get together, get to know each other, if you require any of our services—this is the AMEX talking to us—if we can help you on any of your problems, let us know. We are all ready to help you.

"Q. During the same period, that is, beginning in December 1979 through the spring of 1970, was Blair & Co., given certain instructions concerning its net capital condition by the New York Stock Exchange? A. Between what period?

"Q. Beginning December 1969 and through the spring of 1970. A. Oh, yes. That was a rather critical period in there.

"Q. During that time did you receive any comparable instructions from the American Stock Exchange? A. Not that I know of." (A 421.)

Mr. Ramsey confirmed that the meeting was informal in nature. Quite naturally, since, as Mr. Ramsey testified in detail, he had previously informed the S.E.C. and the NYSE of the full particulars of Blair's problems and both were actively regulating its affairs, he did not make a detailed presentation to the AMEX at the luncheon meeting regarding Blair's situation or the remedial steps being directed by others:

> Q. Do you recall now the reason why this luncheon was set up? A. Generally.
>
> Q. Tell us your general recollection, please. A. To discuss what the firm was trying to do in its relationship with the American Stock Exchange, as to how they could be helpful to us and we to them.
>
> * * *
>
> Q. Tell us to the best of your recollection what you told the members of AMEX and what discussion was had at that meeting. A. I don't recall the contents of the meeting.
>
> Q. You don't recall anything at all that was discussed on February 10th at the AMEX luncheon meeting? A. Specifically, no.
>
> Q. Generally. A. Generally, it was the state of the market, the state of the firm, the earnings that we were having difficulties with, all generalities. Specifically I do not recall.
>
> Q. Did you tell the assembled members of AMEX about the condition of Blair & Company at that time? A. I don't recall.
>
> Q. Did you tell the assembled members of AMEX that you did not know whether or not you were in capital compliance? A. I don't recall.
>
> * * *

> Q. Did you also discuss with the assembled members of AMEX the condition of the Blair books at that time? A. I don't recall the discussion. (A 467-71.)

Plaintiffs called no other witnesses to prove that any specific information concerning Blair's financial condition and related matters was given to AMEX or that AMEX participated in the regulation of Blair at any time during the relevant period.

Finally, the record is barren of any reference to knowledge of or participation by the AMEX in the negotiation, approval or consummation of the transaction by which plaintiffs made their investment in Blair or the steps subsequently taken to supervise Blair's capital compliance and financial condition. Each of the individual plaintiffs testified that they had no communication with defendant AMEX regarding their dealings with Blair (A 271, 302, and 303). Defendant AMEX could not have made any misstatement to plaintiffs nor did defendant AMEX participate in the preparation of, review, or approve any of the documents allegedly relied upon by plaintiffs in reaching their decision to loan their securities to Blair. Similarly, the AMEX did not have knowledge of or participate in the efforts to bring Blair into capital compliance—the AMEX did not inspect or monitor Blair's financial condition nor did it issue instructions to Blair concerning its financial condition and steps to ameliorate its problems. The AMEX did not direct liquidation of any subordinated securities in Blair accounts. In short, the AMEX did not have knowledge of and did not participate in any act upon which plaintiffs seek to impose liability in this action.

POINT I

Defendant AMEX had no duty to supervise the financial condition of Blair.

Plaintiffs' principal allegation against defendant AMEX is that it breached duties and obligations imposed upon it under Section 6 of the Exchange Act by failing to supervise and regulate the financial condition of Blair. It has been established that defendant AMEX performed no regulatory function with respect to the financial condition of Blair during the relevant period. On this appeal, plaintiffs argue that such inaction by the AMEX is a sufficient predicate for imposition of liability upon defendant AMEX under Sections 10(b) and 20(a) of the Exchange Act. The trial court dismissed all claims against defendant AMEX based upon its finding that the AMEX Rules, which are approved by the S.E.C., clearly provide that the AMEX exercises no supervision over the financial condition of dual members such as Blair. Rather, such supervision is allocated by the AMEX Rules to defendant NYSE which performed all such regulatory functions with respect to Blair. Thus, the regulatory scheme established by Congress in the Exchange Act and implemented by the rules of the national securities exchanges, subject to review and approval by the S.E.C., provides that defendant AMEX had no duty to supervise the financial condition of Blair. The absence of such duty coupled with defendant AMEX's lack of knowledge of and involvement in the events complained of requires the affirmance of the dismissal of all claims against it.

Section 6 of the Exchange Act establishes certain requirements which national securities exchanges must meet

in order to be registered as such with the S.E.C. Pursuant to Section 6 of the Exchange Act,* a national securities exchange is required to file with the S.E.C. "copies of its constitution, articles of incorporation with all amendments thereto, and of its existing by-laws or rules or instruments corresponding thereto," as well as "copies of any amendments to the rules of the exchange forthwith upon their adoption." (Section 6(a)(3) and (4).) In order to qualify for registration, the S.E.C. must find that the exchange "is so organized as to be able to comply with the provisions of this title and the rules and regulations thereunder and that the rules of the exchange are just and adequate to insure fair dealing and to protect investors. . . ." (Section 6(d).) Pursuant to Section 19(b) of the Exchange Act, the S.E.C. is authorized "by rules or regulations or by order to alter or supplement the rules of [a national securities] exchange" if it determines "that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange. . . ."

The AMEX's rules with respect to the surveillance and supervision of the financial condition of its member firms clearly provide that supervision of the financial condition of member firms which are also members of the NYSE is not to be performed by the AMEX, but by the NYSE. As discussed below, this allocation of regulatory responsibility to the NYSE for supervision of the financial condition of dual NYSE-AMEX member firms has been approved by the S.E.C., and is recognized by Congress and the S.E.C. as

* Unless otherwise indicated reference is made to the statutory language in effect at the times relevant to the amended complaint herein. 15 U.S.C. §§78a, *et seq.* (1970).

necessary to ensure the efficient and coordinated supervision of member firms required by Section 6 of the Exchange Act.

At the time of the events set forth in the amended complaint, five AMEX rules were in effect which required certain reports by member firms with respect to their financial condition.* AMEX Rule 441 required member organizations not exempted by Rule 440 to file with the AMEX periodic statements of their financial condition and the condition of their accounts. However, such statements were not required from "a member firm or member corporation subject to the jurisdiction of another exchange unless the American Stock Exchange so directs." The provisions of Rule 442 required a member organization to make disclosures of its financial condition to its customers. However, this requirement did not apply to member organizations subject to the financial reporting requirements of the NYSE. Rule 443 required an annual surprise audit of member organizations by an independent public accountant, but "[t]he provisions of this Rule shall not apply to a member firm or member corporation subject to the jurisdiction of another exchange unless the American Stock Exchange so directs." Similarly, the provisions of Rule 444 regarding reports of capital borrowing by members or member organizations contained an exemption from such

* The rules discussed are those which were in effect on March 1, 1970, and were introduced at the trial as Plaintiffs' Exhibit 51 in evidence. These rules are set out in the Supplement to Exhibit Volume of the Joint Appendix appended to this brief at E 465-468. The rules in effect on March 1, 1970 are basically the same as those in effect at all times referred to in the amended complaint. The AMEX's present rules with respect to the reports of financial condition of member firms are essentially the same as those discussed herein. 2 CCH, AMERICAN STOCK EXCHANGE GUIDE ¶¶7450-9457.

general reporting requirements for members and member organizations required to report such transactions to another exchange. This rule was later amended to provide that this exemption applied only to transactions reportable to the NYSE. (Rule 444(d), 2 CCH, AMERICAN STOCK EXCHANGE GUIDE ¶9454.) Finally, Rule 445 required a weekly statement of a member organization's obligations in respect of security underwritings, however, "[s]uch statements need not be filed by a member firm or member corporation which submits similar statements to another exchange of which it is a member."*

Both the S.E.C. and Congress have recognized that this allocation of regulatory responsibility to the NYSE for supervision of the financial condition of dual NYSE-AMEX member firms is necessary to avoid burdening the exchanges and their member firms with wasteful and duplicative reporting requirements, and to ensure the effective and coordinated regulation which is essential to the self-regulatory concept of the Exchange Act.

The Securities and Exchange Commission has long recognized the need for such allocation of regulatory responsibility. In a statement to the House Subcommittee on

* In a pre-trial motion plaintiffs also asserted that defendant AMEX had failed to properly supervise the dissemination of public advertising by Blair. Like the supervision of Blair's financial condition, the self-regulatory responsibility for supervising the advertising of dual NYSE-AMEX member firms was also allocated to the NYSE. AMEX Rule 481 provided (and still provides) that advertisements by AMEX member organizations were subject to prior approval by the AMEX, except that "[t]he provisions of this rule shall not apply to any advertisement of a member firm or member corporation subject to similar requirements of the New York Stock Exchange. . . ." Plaintiffs' Exhibit 51, Rule 481 at ¶9491.

Commerce and Finance on November 17, 1971, then S.E.C. Chairman William J. Casey summarized the situation:

> "All broker-dealers are, of course, under the direct supervision of the S.E.C.; many are also under the jurisdiction of more than one self-regulatory agency. It has long been recognized that this situation could result in an unnecessary and burdensome duplication of regulatory activities. Consequently, over the years efforts have been made to avoid this duplication by allocating regulatory responsibilities among the variout agencies involved. In our opinion, this allocation of responsibility has, on the whole, worked successfully.
>
> "The New York Stock Exchange and the American Stock Exchange (for non-NYSE members) assume the primary responsibility for regulation of their respective members, regardless of whether they are also members of a regional exchange." Hearings Before the Subcommittee on Commerce and Finance of the Committee on Interstate and Foreign Commerce, H.R. Rep. No. 92-37b, 92d Cong., 1st Sess. 1713 (1972). (Emphasis added.)

Earlier, in its report to Congress entitled "Special Study of Securities Markets" (printed as H.R. Doc. No. 95, 88th Cong. 1st Sess. (1963)) ("Special Study"), the S.E.C. recognized the interest of the public, the regulatory agencies and the securities industry in avoiding wasteful and redundant regulation and encouraging coordination of regulation by allocating regulatory responsibilities in the most efficient and productive manner. In describing the situation as found to exist in the securities industry with respect to the need to allocate regulatory responsibilities, the Special Study reported:

> "The subject of coordination is of great importance if only because of the substantial number of broker-

dealers with memberships in more than one self-regulatory body. Over 90 percent of all exchange member firms also belong to the NASD. The percentage of NYSE firms is even greater—as of February 28, 1962, 644 of 677 NYSE firms, or 95 percent of the total, were also members of the NASD. Among the exchanges themselves multiple memberships are common. Over one-third of all regional exchange member firms also belong to one or both of the two major New York exchanges. Moreover, although each self-regulatory body has its own area of special concern, their spheres of regulation are not mutually exclusive. On some matters, such as their member firms' compliance with capital ratio requirements or Regulation T, their interests may largely overlap or coincide, and there is considerable overlapping in other areas where the regulatory concern of a particular agency extends beyond a particular market.

"For the firm with multiple memberships, any unnecessary duplication of regulation, or lack of coordination in regulatory efforts, produces added costs and burdens that should be avoided to the extent possible. This is at least equally important for the regulatory agencies—with large tasks and limited budgets, it is obviously desirable to avoid duplication and achieve coordination and division of labor to the maximum extent consistent with the fulfillment of their respective responsibilities. . . ." 4 Special Study at 728-729. (Footnotes omitted.)

The authors of the Special Study recommended that in order to improve efficiency and economy of the total regulatory effort by avoiding duplication, "in the interests of the public, the regulatory agencies and the securities industry, further and continuing attention should be given to possibilities for coordinating efforts and allocating respon-

sibilities in a more efficient and productive pattern. . . ." 4 Special Study at 738. The AMEX's rules allocating the regulatory responsibility for supervising the financial condition of dual NYSE-AMEX member firms to the NYSE are, of course, intended to meet this need to achieve efficiency and coordination in self-regulation under the Exchange Act.

The Congress has also recognized this need for efficiency and coordination in self-regulation and, with the enactment of the Securities Investor Protection Act of 1970 (15 U.S.C. §§78aaa-78lll), expressly approved of the approach to effective self-regulation through a clear division of labor among self-regulatory bodies. That Act created the Securities Investor Protection Corporation (SIPC), whose membership includes nearly all broker-dealers, as a means of providing greater protection for the customers of broker-dealers. The SIPC legislation created new reporting and regulatory responsibilites for the self-regulatory organizations in order to supervise the financial condition of broker-dealers. Section 9(c) of the SIPC legislation, as amended in 1975,* provides that when a SIPC member is a member of more than one self-regulatory organization, the S.E.C. shall designate one of such organizations to inspect or examine the member "for compliance with applicable financial responsibility rules." Similarly, affirming the Congressional intent that allocation of supervisory responsibility to one self-regulatory organization is the favored

* Section 9(c) of the 1970 legislation was amended by Section 26 of the Securities Acts Amendments of 1975 (Pub. L. No. 94-26, 89 Stat. 104, June 4, 1975) to shift from the SIPC to the S.E.C. the responsibility for designating the self-regulatory organization responsible for supervising the financial condition of dual members.

means of monitoring the financial condition of broker-dealers, Section 9(f) of the SIPC legislation authorizes the S.E.C. to:

> "require any self-regulatory organization to inspect or examine any members of such self-regulatory organization in relation to the financial condition of such members. *In the case of a broker or dealer who is a member of more than one self-regulatory organization the Commission, to the extent practicable, shall avoid required duplication of examinations, inspections, and reports.*" (Emphasis added.)

The S.E.C. has implemented this authority, by the promulgation of Rule 17d-1, pursuant to Section 17 of the Exchange Act, as amended. 41 Fed. Reg. 18808 (May 7, 1976); 3 CCH Fed. Sec. L. Rptr. ¶26,187A (to be codified in 17 CFR §240.17d-1).

Most recently, the Congress has provided, by the Securities Act Amendments of 1975 (Pub. L. No. 94-26, 89 Stat. 104, June 4, 1975), that the concept of allocation of responsibility for supervision of member organizations by the self-regulatory organizations may be extended beyond regulation of member organizations' financial condition to encompass all phases of an exchange's regulation of a member's activities. Exchange Act, Section 17, as amended by Section 14 of the Securities Acts Amendments of 1975; Section 19 as amended by Sections 16 and 17 of the Securities Acts Amendments of 1975; and Section 23 as amended by Section 18 of the Securities Acts Amendments of 1975. The S.E.C. has commenced its implementation of this authority by adoption of Rule 17d-2, Program for allocation of regulatory responsibility (41 Fed. Reg. 49093 (November 8, 1976); 3 CCH Fed.Sec.L.Rptr. ¶26,187B (to be cod-

ified in 17 CFR §240.17d-2)). At the time of the adoption of Rule 17d-2, *The New York Times* reported S.E.C. Chairman Roderick Hills as stating "we are very hopeful that this program will result in significant reduction of unnecessary and costly duplication of regulatory effort and regulatory burden throughout the securities industry," and that "it had long been the commission's view that duplication of [regulatory] effort 'does not result in a higher level of investor protection commensurate with its cost, and should therefore be eliminated.' " *N.Y. Times,* October 29, 1976 at D5, col. 1.

The AMEX's rules with respect to supervision of the financial condition of dual NYSE-AMEX member firms clearly provide that the NYSE, rather than the AMEX was to supervise the financial condition of Blair. Not only were these rules approved by the S.E.C., but they are entirely consistent with what the Seventh Circuit Court of Appeals has described as "the avowed intention of Congress and the Securities and Exchange Commission that there be more coordination and less duplication of self regulatory activities." *Hochfelder v. Midwest Stock Exchange,* 503 F.2d 364, 373, and n.7 (7th Cir. 1974), *cert. denied,* 419 U.S. 875 (1974). The court below correctly held (A 1004-1006) that by virtue of its Rules the AMEX had no duty to monitor or regulate the capital compliance and financial condition of Blair since that responsibility had been exclusively allocated to the NYSE. *See, Murphy v. McDonnell & Co., Incorporated,* [CURRENT] CCH Fed. Sec. L. Rptr. ¶96,021 at 91,587 (2d Cir., April 14, 1977).

POINT II

The trial court correctly dismissed plaintiffs' claims under Section 10(b) against defendant AMEX.

Plaintiffs' claims against defendant AMEX under Section 10(b) of the Exchange Act were correctly dismissed by directed verdict. Indeed, in their brief, plaintiffs make no serious attempt to argue that there is any basis upon which defendant AMEX may be held primarily liable under Section 10(b). Having failed to adduce any specific evidence on the basis of which defendant AMEX might be held to have had knowledge of or participated in the events allegedly giving rise to plaintiffs' losses, plaintiffs' argument against defendant AMEX reduces to a series of general charges* which are wholly unsupported by the record or indeed any specific factual statement in plaintiffs' brief.

Plaintiffs' claims against the AMEX regarding primary liability under Section 10(b) were correctly dismissed for at least three reasons. (1) Plaintiffs testified that they had no contact with defendant AMEX and there is no evidence that defendant AMEX participated in the preparation or dissemination of any of the information upon which plain-

* PB 16 (". . . the Court was satisfied that appellants had sustained their burden of proof with respect to all of the elements of their securities claim except for culpability or 'scienter' "), PB 17 ("There can be little doubt that appellees' inaction, their failure to disclose and participation in the scheme of Blair, its officers and directors constituted material misrepresentations within the meaning of the securities laws."), PB 19 (". . . the facts proved at the trial established a prima facie case of 'scienter'."), and PB 23-24 ("where, as here, the Exchanges did more than possess knowledge but actually participated in the devices and methods by which appellants were defrauded, it is submitted that the issue of appellees' responsibility under the federal securities laws should have been submitted to the jury.").

tiffs claim to have relied and which they now charge was materially false. Consequently there is no evidentiary basis upon which defendant AMEX could be found to have made any misstatement to plaintiffs. The AMEX neither made nor participated in the making of any material misstatement to plaintiffs and is therefore not liable under Section 10(b). *See, Murphy v. McDonnell & Co., Incorporated,* [CURRENT] CCH Fed. Sec. L. Rptr. ¶96,021 (2d Cir., April 14, 1977).

(2) Similarly, since there is no evidence establishing knowledge by the AMEX at any relevant time of information material to plaintiffs' investment decision and since defendant AMEX made no statement to plaintiffs the AMEX can not be held liable for any omission to disclose a material fact necessary to make its statements not misleading. *See, Katz v. Realty Equities Corporation of New York,* 406 F. Supp. 802, 805 (S.D.N.Y. 1976). Moreover, for the reasons set forth in the brief of defendant NYSE and due to the provisions of the AMEX Rules which provided that the AMEX had no duty to monitor or supervise the financial condition of Blair, which functions were performed by defendant NYSE as discussed in Point I, there was no duty on the part of AMEX to make any disclosure to plaintiffs absent actual knowledge of a fraud being perpetrated upon plaintiffs. " 'Knowledge of the fraud, and not merely knowledge of the undisclosed material facts, is indispensable' to create a duty to disclose in these circumstances." *Murphy v. McDonnell & Co., Incorporated, supra,* ¶96,021 at 91,588 quoting from *Hirsch v. DuPont,* [CURRENT] CCH Fed. Sec. L. Rptr. ¶96,011 at 91,544 (2d Cir., April 7, 1977). Here, defendant AMEX was com-

pletely uninformed as to the underlying facts as well as the alleged fraud and therefore may not be held liable under Section 10(b).

(3) Finally, as discussed in the brief of defendant NYSE, under the principles articulated by the Supreme Court in *Ernst & Ernst v. Hochfelder,* 425 U.S. 185 (1976) plaintiffs can not prevail upon a claim under Section 10(b) unless they prove a defendant acted with scienter-intent to deceive, manipulate, or defraud. Plaintiffs failed to adduce any proof at trial that defendant AMEX's conduct, which consisted solely of non-involvement in the events complained of, was imbued with the element of scienter necessary to establish a private cause of action for damages under Section 10(b) of the Exchange Act. *See, Hirsch v. DuPont, supra,* ¶96,011 at 91,544; *cf. Murphy v. McDonnell & Co., Incorporated, supra,* ¶96,021 at 91,588; *Arneil v. Ramsey,* [1976-77 Transfer Binder] CCH Fed. Sec. L. Rptr. ¶95,865 at 91,183, n. 11 (2d Cir., February 16, 1977). The absence of proof of scienter as to defendant AMEX is highlighted in plaintiffs' Brief. Plaintiffs list six factual assertions upon the basis of which they claim defendant NYSE acted with the requisite scienter in this action. (PB 22.) Significantly, plaintiffs do not even claim that the AMEX had knowledge of or participated in any of those matters and the record is barren of any evidence which might support such a claim against the AMEX. There was no evidence adduced at trial upon which the AMEX could have been found to have violated Section 10(b).

Plaintiffs apparently also contend that defendant AMEX may be held liable as an aider and abettor of the fraudulent conduct of others (PB 23-26). For purposes of

this argument it is apparently conceded by plaintiffs that the AMEX neither ha[illegible] knowledge of the events giving rise to plaintiffs' losses nor participated in any act which aided the perpetration of the alleged fraud, for despite plaintiffs' general statement that defendants not only had knowledge of the alleged fraud but actually participated therein (PB 23-24), plaintiffs' specification of such claims (PB 25-26) fails to identify any fact regarding such fraud of which the AMEX had knowledge and fails to identify any action by the AMEX in furtherance of or assisting the alleged fraud. In any event there is no evidence in the record of any such knowledge or participation by the AMEX. With re[illegible]ct to defendant AMEX at least, pl[illegible]ntiffs' argument must be that the AMEX may be liabl[illegible]as an aider and abettor of violations of Section 10(b) solely by reason of its uninformed inaction.

Initially plaintiffs' claims against defendant AMEX as an aider and abettor fail because, as discussed above, there is no proof of scienter on the part of the AMEX. If liability under Section 10(b) of the Exchange Act may be predicated on the theory of aiding and abetting at all (*see, Ernst & Ernst v. Hochfelder*, 425 U.S. 185 at 191, n. 7 (1976)), then plaintiff must certainly establish that the secondary defendant acted with scienter to avoid "the anomaly of assessing liability on peripheral defendants on a lesser standard of culpability than that required for the direct liability of a principal." *Katz v. Realty Equities Corporation of New York, supra*, 406 F. Supp. at 805.

The general standard of liability for one alleged to have aided and abetted a securities fraud requires in addition to proof of an underlying violation and proof that the sec-

ondary defendant acted with scienter, proof that the secondary defendant had general awareness that his role was part of an overall activity that is improper and knowingly and substantially assisted in the violation. As stated by this Court in *Hirsch v. DuPont, supra,* ¶96,011 at 91,544: "It is clear that knowing assistance of or participation in a fraudulent scheme gives rise to liability under §10(b) as an aider or abettor." Plaintiffs have failed to adduce any evidence establishing against defendant AMEX either of these elements of a cause of acting for aiding and abetting a securities fraud.

In an effort to avoid such failure of proof, plaintiffs rely upon a collection of dicta in appellate decisions and rulings by trial courts denying motions addressed to the pleadings for the proposition that a person may be held liable for aiding and abetting a securities fraud by mere inaction (PB 23-24). The short answer to plaintiffs' contention was articulated by the Ninth Circuit in *Wessel v. Buhler,* 437 F.2d 279, 283 (1971) in which plaintiff sought to impose aiding and abetting liability upon an accountant who had prepared unaudited financial statements later used without his participation in a misleading prospectus. The court dismissed the claim in ringing terms:

> There is not a scrap of authority supporting this extraordinary theory of Rule 10b-5 liability, and we will not supply any in this case.
>
> We find nothing in Rule 10b-5 that purports to impose liability on anyone whose conduct consists solely of inaction.

Adopting the Ninth Circuit's holding, the trial court in *Hirsch v. DuPont, supra,* similarly held that mere inaction can never, absent an independent duty of disclosure, give

rise to liability as an aider—abettor. *Hirsch v. DuPont,* [1976-77 transfer binder] CCH Fed. Sec. L. Rptr. ¶95,645 at 90,205 (S.D.N.Y., June 30, 1976), *aff'd on other grounds,* [CURRENT] CCH Fed. Sec. L. Rptr. ¶96,011 at 91,544 (2d Cir., April 7, 1977). No case cited by plaintiffs establishes a rule of law permitting the imposition of aider and abettor liability against defendant AMEX in this action.

Plaintiffs principally rely upon *Brennan v. Midwestern United Life Insurance Co.,* 417 F.2d 147 (7th Cir. 1969), *cert. denied,* 397 U.S. 989 (1970) in which secondary liability was imposed upon the issuer of securities, Midwestern, for the frauds perpetrated by the broker for buyers of such securities. Midwestern was held liable as an aider and abettor upon findings that Midwestern had committed affirmative acts in support of the broker's fraud, not mere inaction (417 F.2d at 148, 150-51). It was established at trial in that action that defendant Midwestern had acquired actual knowledge of the broker's scheme and indeed had threatened to expose the broker's activities but had failed to do so to enable Midwestern to reap the rewards of the fraud (417 F.2d at 150-54). Moreover, despite plaintiffs' claims that the instant facts fit those of *Brennan* as to defendant NYSE, there is no basis in the record for application of the rationale to defendant AMEX which, pursuant to its rules had no duty to and did not exercise supervision over the financial condition of Blair, had no knowledge of and did not participate in the underlying transaction between plaintiffs and Blair, and did not have any knowledge of or reason to suspect that a fraud was being perpetrated upon plaintiffs. Knowledge of the fraud itself is essential to liability as an aider and abettor. *Hirsch v. DuPont, supra,* ¶96,011 at 91,544; *Murphy v. McDonnell & Co., Incor-*

porated, supra, ¶96,021 at 91,588. Defendant AMEX had no such knowledge and therefore may not be held liable as an aider and abettor.

The facts of this case with respect to defendant AMEX are somewhat analogous to those presented in *Hochfelder v. Midwest Stock Exchange,* 503 F.2d 364 (7th Cir.), *cert. denied,* 419 U.S. 875 (1974), not cited by plaintiffs, in which the court discussed aiding and abetting liability in the context of an action by customers defrauded in securities transactions by a broker which was a member of defendant stock exchange. There the Seventh Circuit stated the following principle:

> [W]e are not prepared to hold that a claim for aiding and abetting solely by inaction cannot be made under Rule 10b-5. In invoking such a rule, however, we would not go so far as to charge a party with aiding and abetting who somehow unwittingly facilitated the wrong of another. Rather, to invoke such a rule investors must show that the party charged with aiding and abetting had knowledge of or, but for a breach of duty of inquiry, should have had knowledge of the fraud, and that possessing such knowledge the party failed to act due to an improper motive or breach of a duty of disclosure. 503 F.2d at 374.

Having stated this rule the court affirmed a summary judgment in favor of defendant stock exchange based on findings that it did not have actual knowledge of the fraud and had not failed to learn thereof by reason of a breach of its duties under Section 6 of the Exchange Act. 503 F.2d at 374-75. Here, as found by the court below, defendant AMEX committed no breach of its Section 6 obligations since pursuant to its rules the monitoring and supervision of Blair's finan-

cial condition was allocated to defendant NYSE, and defendant AMEX acquired no actual knowledge during the relevant period either of plaintiffs' investment in Blair or the alleged fraudulent conduct of others in connection therewith. Moreover, even plaintiffs do not ascribe an improper motive to defendant AMEX's conduct in conformance with its rules and, for the reasons demonstrated in the brief of defendant NYSE, defendant AMEX had no independent duty of disclosure. In such circumstances defendant AMEX can not be liable as an aider and abettor. *See, Murphy v. McDonnell & Co., Incorporated, supra,* ¶96,021 at 91,588.

POINT III

The AMEX is not liable as a controlling person under Section 20(a).

The illogic of plaintiffs' belated argument that the defendant exchanges may be liable as controlling persons of Blair under Section 20(a) of the Exchange Act is amply demonstrated by the authorities cited in the Brief of defendant NYSE, particularly the opinion of District Judge Williams in *Carr v. New York Stock Exchange,* 414 F. Supp. 1292 (N.D. Cal. 1976) which rejected the notion that a national securities exchange may become a controlling person of a member firm by reason of its regulation of the firm's affairs pursuant to its responsibilities under Section 6 of the Exchange Act.* Defendant AMEX adopts the

* Plaintiffs also refer to the liability imposed upon "controlling persons" under Section 16 of the Securities Act of 1933 (15 U.S.C. §§77a, *et seq.*) (by which reference it is assumed plaintiffs intended to refer to Section 15 of that Act (15 U.S.C. §77o)) for violations of Sections 11 and 12 of that Act. Reliance upon that provision is inapposite since no claim under the relevant sections of the Securities Act of 1933 has been pleaded or proved in this action.

arguments advanced in the brief of defendant NYSE against the applicability of Section 20(a) to defendants.

Moreover, under the facts of this case, the inapplicability of controlling persons' liability to defendant AMEX is manifest even under plaintiffs' notions of the reach of the statute. Plaintiffs claim defendant NYSE became a controlling person of Blair by reason of its efforts to normalize the financial affairs of Blair (PB 27, 29). Yet plaintiffs concede that defendant AMEX did not participate in any such supervisory activities (PB 27, 30). The reason is plain. Defendant AMEX had no duty to participate in the supervision of the financial condition of Blair & Co. since, pursuant to its Rules, those functions had been allocated to the NYSE. Defendant AMEX simply had no duty to participate in the events complained of and did not participate. Even if a national stock exchange could become a controlling person of a member firm by virtue of pervasive regulation of such member firm and direction of its affairs, which it is respectfully submitted would be an improper application of the statute, there is not a wisp of evidence to support even an inference that defendant AMEX exercised such control over Blair in this action.*

Finally, while defendant AMEX presented no evidence due to the dismissal of all claims against it at the close of plaintiffs' case, plaintiffs failed to raise any genuine issue of fact that defendant AMEX acted in good faith and did not induce the fraud complained of. Plaintiffs concede in their brief that defendant AMEX took no action to super-

* Alternatively, if plaintiffs' contention is that defendant AMEX somehow became a controlling person of defendant NYSE the proposition must be rejected. Defendant AMEX exercised no potential or actual control over defendant NYSE.

vise the financial condition of Blair and did not participate in any of the events allegedly giving rise to their loss (PB 27, 30). Nowhere in the litany of acts by others allegedly inducing the fraud do plaintiffs even claim that defendant AMEX participated therein. It did not. Under such circumstances defendant AMEX can not be held liable under Section 20(a) if its inaction was motivated by good faith. It was. Lacking knowledge of the relevant events, including plaintiffs' transactions, there is no basis upon which lack of good faith may be asserted. And since defendant AMEX's lack of knowledge of and non-involvement in the activities complained of was the direct result of its compliance with its Rules which absolved it of a regulatory responsibility with respect to Blair's financial condition, its good faith is established. As found by the trial court:

> [A] reasonable juror could not conclude that the American Stock Exchange had not acted reasonably in the circumstance because the American Stock Exchange had a right to assume, . . . that the New York Stock Exchange would supervise Blair appropriately in the circumstances and that the net capital problem, which would have been the same for both Exchanges, would have been as well regulated by the New York Stock Exchange as by itself, as would the other problems that Blair faced. A 1005.

Defendant AMEX is not liable to plaintiffs as a controlling person under Section 20(a) of the Exchange Act.

Conclusion

For the foregoing reasons, the judgment below dismissing all causes of action against defendant American Stock Exchange, Inc. should be affirmed with costs.

Dated: New York, New York
May 6, 1977

Respectfully submbitted,

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SUPPLEMENT TO EXHIBIT VOLUME OF THE JOINT APPENDIX

Section 8. Reports of Financial Condition

¶ 9450 Firms and Corporations Not Doing Customer Business Must File a Certificate

Rule 440. Each member firm and member corporation shall file with the Exchange, unless the contrary is true, a statement signed by all partners of such member firm, all holders of voting stock of a regular member corporation or the executive officers of an associate member corporation certifying that such firm or corporation does not, and will not without first withdrawing such statement, carry margin accounts, free credit balances or securities in safekeeping for customers or make cash transactions for customers involving extension of credit by such firm or corporation to, or the receipt by such firm or corporation of securities or monies from, customers and that such firm or corporation is not a clearing member of American Stock Exchange Clearing Corporation.

Amendments.
September 6, 1962.

¶ 9451 Firms and Corporations Doing Customer Business Must File Financial Reports

Rule 441. Every member firm and member corporation which has not on file with the Exchange a statement made pursuant to Rule 440 and every individual member of the Exchange who is a clearing member of American Stock Exchange Clearing Corporation shall file with the Exchange once in every four months during each twelve month period, unless the Exchange otherwise directs, a statement in a form prescribed by the Exchange of its financial condition and the condition of its accounts, including free credit balances and securities in safekeeping. The statement shall be signed by each partner of a member firm, all holders of voting stock in a regular member corporation or the executive officers of an associate member corporation unless for good cause shown the signature of one or more such persons is waived by the Exchange. The Exchange may prescribe similar or different forms of statement for the several reporting periods and may prescribe different reporting dates for different firms or corporations. The provisions of this rule shall not apply to a member firm or member corporation subject to the jurisdiction of another exchange unless the American Stock Exchange so directs.

Amendments.
August 4, 1960.
September 6, 1962.

¶ 9452 Disclosure of Financial Condition to Customers

Rule 442. Every member organization required under Rule 441 to submit reports of financial condition to the Exchange shall:

(a) within thirty-five days of the date after which the answer to each annual audited financial questionnaire is required to be filed with the Exchange, send to each customer either

(1) A statement of financial condition of the organization based upon such audit, including the independent public accountant's report on the statement of financial condition of the organization or, if the audit is not completed,

(2) a notice reading as follows:

"An audit of this organization as of (date) is now in process by independent public accountants. A financial statement of the firm (corporation), based on the audit now being conducted, will be mailed to all customers having an open account when such statements are available for distribution."

The financial statement based on the audited answers to the financial questionnaire shall be one which is prepared in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding audited statement, and shall include, in the basic statement or in accompanying footnotes, all informative disclosures necessary to make the statement a clear expression of the organization's financial condition and must be accompanied by the independent public accountant's report expressing an opinion on such statement; and

(b) make available at other times of the year at a customer's request or distribute to customers an unaudited statement of its financial condition based on its most recent report to the Exchange, or as of a date subsequent thereto, in a form approved by the Exchange.

Unaudited financial statements made available or distributed to customers at other times during the year shall follow in form and accounting principles the audited statements and shall be statements which in the opinion of the organization fairly present the financial condition of such organization.

Each monthly statement of account sent to a customer shall bear a legend reading as follows:

"A financial statement of this firm (corporation) is available for your personal inspection at its offices, or a copy of it will be mailed upon your written request."

• • • *Commentary*

.10 The term "customer" as used in the above Rule means any person or party who either at the time of requesting such a financial statement or at the time of the distribution of such annual statement has an open account with the member organization.

.20 Each member organization shall file with the Examinations Department of the Exchange, promptly after completion of the required annual audit, an exact copy of the statement of financial condition, based upon such audit, which the firm intends to submit to its customers. However, copies of other financial statements need not be filed with the Examinations Department unless the organization has not been in existence a sufficient length of time to have had such a required annual audit.

August 4, 1960.
September 6, 1962.
January 16, 1970.

¶ 9453 Independent Audits

Rule 443. The Exchange may require any member, member firm or member corporation to file with it, as of any date fixed by the Exchange, an audit, prepared by an independent public accountant, of his accounts, assets and liabilities, including free credit balances and securities held for

safekeeping, in such form as the Exchange may prescribe. The Exchange shall require the filing at least once in each twelve month period of such an audit by each member firm and member corporation. The provisions of this Rule shall not apply to a member firm or member corporation subject to the jurisdiction of another exchange unless the American Stock Exchange so directs.

Amendments.
April 5, 1962.
September 6, 1962.

¶ 9454 Reports of Member Indebtedness and Loans

Rule 444. Every member, member firm and general partner thereof and member corporation shall report to the Exchange on or before the tenth day of each month the following:

(a) Aggregate indebtedness arising from borrowings of cash or securities from any source whatsoever if such indebtedness equals or exceeds in any month the sum of $1,000. Each member, member firm and general partner thereof and member corporation of the Exchange shall include in aggregate indebtedness any monetary obligations arising out of past business transactions or associations.

(b) Each loan in the amount of $1,000 or more or series of loans aggregating $1,000 or more, whether cash or securities, made to any member, member firm or general partner thereof, member corporation or holder of voting stock in a regular member corporation. This report shall include any sum due from a member, member firm or member corporation of the Exchange arising out of past business transactions or associations.

The following need not be reported under paragraph (b) or included in computing aggregate indebtedness for the purpose of paragraph (a):

(1) Any loan fully secured by readily marketable collateral so long as the loan remains so secured.

(2) Any borrowing of securities for the purpose of effecting delivery against a sale where money payment equivalent to the market value of the securities is made to the lender and such contract is marked approximately to the market.

(3) Any borrowing on a life insurance policy which is not in excess of the cash surrender value of the policy.

(4) Any loan obtained from a bank, trust company, monied corporation or fiduciary on the security of real estate.

(5) Any loan transaction between general partners of the same firm, between parties to a joint-account registered with the Exchange or between holders of voting stock in the same regular member corporation.

(6) Any loan transaction of a member firm or partner thereof, member corporation or holder of voting stock in a regular member corporation required to report loan transactions to another exchange, provided, however, that this exception shall not be deemed to exclude the reporting by members, member firms and partners thereof, member corporations and holders of voting stock in regular member corporations of any loans to or borrowings from any regular member of the American Stock Exchange which are reportable under this Rule.

No report need be filed under this Rule for any month in which no increase or decrease in reported aggregate indebtedness, decrease in loans reported.

new loan of $1,000 or more or series of loans to any single borrower aggregating $1,000 or more is made.

Amendments.

September 6, 1962.

¶ 9455 Weekly Statement of Obligations and Net Positions in Respect of Security Underwritings

Rule 445. Every member firm or member corporation having obligations in respect of security underwritings shall submit to the Exchange weekly a statement of such obligations and the net positions resulting therefrom in such form as the Exchange may direct. Such statements need not be filed by a member firm or member corporation which submits similar statements to another exchange of which it is a member.

Amendments.

September 6, 1962.

#6110

Affidavit of Service by Mail

In re:

Foley v New York Stock Exchange

State of New York
County of New York, ss.:

Harry Minott,

being duly sworn, deposes and says, that he is over 18 years of age. That on MAY 6 - 1977, 197 , he served 2 copies of the within Brief in the above-named matter on the following counsel by enclosing said three copies in a securely sealed postpaid wrapper addressed as follows:

Hawkins, Delafield & Wood, Esqs.
67 Wall Street
New York, New York 10005
(Attorneys for Plaintiffs-Appellants)

Milbank, Tweed, Hadley & McCloy, Esqs.
1 Chase Manhattan Plaza
New York, New York 10005
(Attorneys for Defendant-Appellee New York Stock Exchange)

and depositing same in the official depository under the exclusive care and custody of the United States Post Office Department within the City of New York.

and depositing same at the Post Office located at Howard and Lafayette Streets, New York, N. Y. 10013.

Harry Minott

Sworn to before me this 6th day of May, 1977

Jack A Messina

JACK A. MESSINA
Notary Public, State of New York
No. 30-2673500
Qualified in Nassau County
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